United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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76-7579

In the

United States Court of Appeals

FOR THE SECOND CIRCUIT

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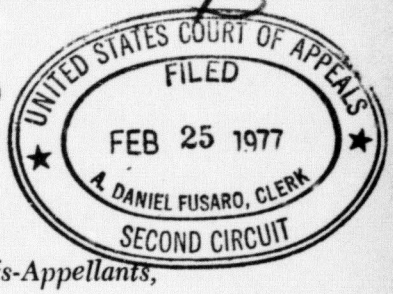

DOCKET NO. 76-7579

FIREBIRD SOCIETY ETC.,
Plaintiffs-Appellants,

v.

MEMBERS OF THE BOARD OF FIRE COMMISSIONERS ETC.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Connecticut

APPELLEE'S BRIEF

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THE MACK CO., NORTH HAVEN, CONN.

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STATUTES INVOLVED

42 U.S.C. § 2000e-5(k)

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

The Civil Rights Attorney's Fees Awards Act of 1976

Be it enacted by the Senate, and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "The Civil Rights Attorney's Fees Awards Act of 1976".

Sec. 2 That the Revised Statutes section 722 (42 U.S.C. 1988) is amended by adding the following: "In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs".

Approved October 19, 1976

C.G.S.A. § 7-111

Any person authorized to approve demands for the price of articles furnished or services rendered to any town, city, borough or public corporation or institution may, before approving any such demand, require the claimant to make oath that the whole of such articles have been furnished or that the whole service has been performed and that no commission, discount, bonus, reward or present of any kind has been received or is promised or expected on account of the same. (1949 Rev., § 697).

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion in its fee award in this case?

2. Did the trial court make adequate findings in support of its award?

3. Did the trial court abuse its discretion when it denied fees to the appellant for opposing intervention, in light of the fact that the appellee also successfully opposed intervention?

STATEMENT OF FACTS

The District Court findings, contained at App. 69 through 73, objectively outline the history of the present lawsuit. The lawsuit, as described by Judge Zampano, contained two separate and distinct proceedings: (1) the filing and settlement of the Title VII action, that portion closing with the District Court's consent order of August 30, 1974; and (2) the attempt by the nonprofit corporation (the "FPCPS") to intervene. The only issue expressly left open in the consent order of August 30, 1974, was the attorney's fee issue now before this court. With regard to the attempted intervention by the "FPCPS", appellees successfully joined the appellants in opposing intervention.

In connection with appellant's motion for a fee award, a full evidentiary hearing was held before the District Judge. Live testimony was offered and time sheets and various affidavits were submitted by the attorneys for the plaintiffs, in accordance with this Court's requirements in *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974). After hearing and evaluating the evidence, the District Judge awarded a total fee of $14,230 plus $1,493.60 costs. Since the motion for attorneys' fees was directed solely against the City of New Haven, the District Judge concluded that entitlement to fees could be equitably ordered only for the plaintiffs' efforts in the portion of the lawsuit which ended with the consent decree of August 30, 1974. The court denied fees against the City for the effort which the City and the plaintiffs had made to oppose intervention, on the ground that the City was also a "prevailing party" as to that issue, such that the award of fees against them would be "fundamentally unjust." App. 200.

ARGUMENT

I.

UNDER THE CIRCUMSTANCES OF THIS CASE, THE DISTRICT JUDGE DID NOT ABUSE HIS DISCRETION IN MAKING HIS FEE AWARD.

"It is well settled that the award of attorney's fees . . . is within the discretion of the trial court and will not be upset unless abused." *Carrion* v. *Yeshiva University*, 535 F.2d 722, 727-28 (2d Cir. 1976). Thus, the issue in this case is not whether the District Judge made the "correct" award, or even whether the District Judge awarded what other judges might have felt was appropriate, but whether the District Judge was within the bounds of his discretion in granting the fee which he ordered.

As the Third Circuit properly said in *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 115 (3rd Cir. 1976):

> Discretion . . . is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. (citations omitted) . . . One seeking to establish such an abuse of discretion . . . assumes a heavy burden.
>
> . . . Stated negatively, the Appellate Court may not upset a trial court's exercise of discretion on the basis of a visceral disagreement with the lower court's decision. Similarly, the Appellate Court cannot reverse where the trial court employs correct standards and procedures and makes findings of fact not clearly erroneous. In sum, if the

> District Court has applied the correct criteria to the facts of the case, then, it is fair to say that we will defer to its exercise of discretion.

There are many factors which a trial court is entitled to consider when it awards an attorney's fee to a prevailing party. Certainly the decision of the trial court is not so easily computed as the appellants would suggest, i.e., simply multiply the hours claimed by the attorneys times "the going rates for similar services." When other factors are considered, the District Court's award of fees in this case may even appear to be generous.

A.
The Contingency Factors In This Case Were Very Slight.

As this court recognized in *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974), success in a lawsuit "is never guaranteed" but, "the greater the probability of success, of either ultimate victory on the merits or of settlement, the less this consideration should serve to amplify the basic hourly fee." Certainly, Judge Zampano considered the appellant's argument that contingency factors should play a part in the award of fees. The Judge specifically noted:

> The court notes, at the outset, that the core issues in the litigation were decided without lengthy and complex litigation. In the early stages of the lawsuit, several of the crucial concerns of the plaintiffs were resolved due to notable concessions by the defendants. App. 200.

Therefore, regardless of how the appellants wish to characterize the course of this lawsuit, it is certain that the trial court did make a determination that this lawsuit was not so complex and

difficult as the appellants urge on appeal. The lawsuit, in fact, progressed to a conclusion by means of chambers conferences in which the trial judge fully participated. Therefore, his statements are anything but "entirely conclusory." Appellant's Brief, at 21. After having observed twenty-three chambers conferences, the trial judge characterized the lawsuit as one which was "resolved by the diligent efforts and commendable cooperation of all the attorneys, including defense counsel." App. 200. It is clear, therefore, that the trial judge considered the "risk of litigation" to the plaintiffs and determined that this case was one which was going to be settled in the early stages.

Furthermore, the appellants' arguments that they "faced not one but two contingencies," Appellant's Brief, at 28, is not well taken. Appellants seems to characterize this type of action as somehow different from a standard contingent fee case, for example, that of a personal injury case. There is, however, no difference. In every contingent fee case, the lawyer must prevail in the lawsuit in order to realize a fee, and the size of the fee may be very small or very large, depending on the recovery effected. In a case such as this one, where the trial judge has determined that "notable concessions" were made by the defendants at the beginnings of the suit, the risk of failure could be perceived by the trial judge as minimal. Moreover, in light of the many attorneys' fees made under Title VII, the risk of a fee not being awarded for the time spent by counsel was also minimal.

B.
The Appellants Have Not Been Penalized For Settling This Lawsuit.

The appellants cannot avoid the fact that for every chambers conference which both attorneys attended, the defendant is being assessed a total attorney's fee of $100 per hour. As the appellants concede, they have not been penalized by a reduction of hours for duplication of efforts spent in chambers conferences. Moreover, the position of appellees is not that attorneys should be penalized for settling lawsuits, but again that the judge may exercise his discretion in awarding fees, and his discretion may take into account the presence of both attorneys Rosen and Koskoff at every chambers conference. Of course, the appellees could have cross-appealed the award of $100 an hour for chambers conference participation by both attorneys, but such an award, while high, could not fairly be called an abuse of discretion. Particularly is this so when it is considered that the trial judge personally participated in every one of those conferences, and was able to weigh the appropriateness of attendance by both attorneys Rosen and Koskoff. Clearly he believed that it was appropriate, for he did not discount any of the attendance by calling it duplication, but he also believed that an attorney's fee of $140 per hour (Attorney Rosen's claim of $65 per hour plus Attorney Koskoff's claim of $75 per hour) was too high. When the trial judge himself attends every one of these chambers conferences, who is to say on appeal that he has abused his discretion by his fee award for activities which took place during those conferences?

There is no penalty here for settling a case. The probability of settlement of this case reduced one major "risk of litigation," the possibility of loss. The trial judge was entitled to consider that factor in making his award.

C.
The Court Has Discretion To Separate Activities In A Lawsuit, And Award A Different Fee For Different Activities.

The appellants have objected to the trial court's decision to separate elements of the fee award into legal services; administrative, procedural and clerical services; and other services. Attorneys Rosen and Koskoff have declared that they do not bill their clients on this basis, but rather bill them a straight hourly fee no matter what activity they are performing. They state at Appellant's Brief, at 18, that the breakdown used by the court "is extraordinarily unattractive. It can continue only as essentially charitable work." Again the appellants overlook the fact that, according to a breakdown of time provided to the trial judge by appellee's attorney, twenty-nine hours of duplication were involved in matters outside chambers conferences. Judge Zampano did not, however, deduct those twenty-nine hours when he awarded the fee. Thus, for twenty-nine hours of administrative, procedural, and clerical tasks, the defendants were ordered by the trial court to pay $70 per hour to the plaintiffs. This is a reasonable fee for clerical time which was duplicated. Above all, it is not an abuse of discretion.

This Court has stated in *City of Detroit* v. *Grinnell Corp.*, *supra*, 495 F.2d at 471: "where several attorneys file a joint petition for fees, the court may find it necessary to use several different rates for the different attorneys. Similarly, the court may find that the reasonable rate for compensation differs for different activities." Further into *Grinnell*, at 473, the court states: "it is conceivable that large amounts of time

could have been spent on comparatively routine matters or ministerial duties." By this statement, the court appears to favor the breakdown used by the trial judge in this case, and seems to endorse the idea that legal services may be valued higher than routine matters or clerical and administrative duties.

II.

THE TRIAL COURT ADEQUATELY FOLLOWED THE STANDARDS OF THIS CIRCUIT UNDER CITY OF DETROIT V. GRINNELL CORPORATION.

In this case, the trial judge listed the factors which he had included in determining the fee award, App. 199, citing *City of Detroit* v. *Grinnell Corp.*, among other cases, as his guideline. Appellants complain that his evaluation of these factors was cursory and conclusory. Certainly, however, his evaluation of time and labor spent was not cursory, since he took the trouble to break down the services into various components as to each lawyer. Moreover, his evaluation of the attorneys here, Attorneys Koskoff and Rosen, as being "skilled, seasoned advocates who enjoy the highest reputation in the legal community," App. 199, is not being questioned. As discussed previously in this brief, the judge did consider the magnitude and complexity of the litigation, and that consideration should be given great weight since he participated extensively in the negotiations himself. Similarly, as previously discussed, the "risk of litigation" could reasonably have been discounted in this case as it appeared to be by the trial judge. This leaves for further consideration only two factors: (1) the amount recovered, and (2) awards in similar cases.

With reference to the amount recovered, as this court noted in *Grinnell:* "The evaluation of a proposed settlement requires an amalgam of delegate balancing, gross approximations, and rough justice." 495 F.2d at 468. Although the *Grinnell* decision approves an evidentiary hearing as a method by which to arrive at a reasonable fee award, it definitely does not, nor could it, mandate that the trial judge give credence to all of the testimony introduced at such a hearing. The City of New Haven strenuously objected to the relevancy of the Hartmann affidavit. App. 104-115. The court. as a matter of law, cannot be said to have abused its discretion by its refusal to consider the conclusions made in this affidavit on its fee award. By the same token, the trial court should not be reversed simply because it did not specifically state that it was discounting the evidentiary value of that affidavit.

Lastly, the court had before it from the City of New Haven a suggestion that an appropriate award, in light of awards given in similar cases, would follow the fee schedule set by the Criminal Justice Act, 18 U.S.C. Section 3006A(d)(1). Some courts have used the standard of compensation set in that act in civil litigation involving public interest cases. *Wyatt* v. *Stickney,* 344 F. Supp. 387, 409-410 (M. D. Ala. 1972), *aff'd. in part sub nom. Wyatt* v. *Aderholt,* 503 F.2d 1305 (5th Cir. 1974); *Knight* v. *Auciello,* 453 F.2d 852 (1st Cir. 1972); *Thonen* v. *Jenkins,* 374 F. Supp. 134, 140 (E.D.N.C. 1974); *Stevens* v. *Dobs, Inc.,* 373 F. Supp. 618, 621 (E.D.N.C. 1974); *Sierra Club* v. *Lynn,* 364 F. Supp. 834, 851 (W.D. Tex. 1973), *rev'd in part,* 502 F.2d 43 (5th Cir. 1974). In this Circuit, in *Equal Employment Opportunity Commission* v. *Enterprise Association Steamfitters,* 542 F.2d 579 (2d Cir. 1976), the court reviewed a District Court's award to the

National Employment Law Project. This court held that the District Court did not abuse its discretion by awarding the Project less than might have been paid to a non-federally funded law firm. Finding that the award was approximately what defense counsel might receive under the Criminal Justice Act, the court stated: "This seems to us a permissible pay scale under all the circumstances."

In this case, the court's award can be considered in two ways: (1) each private attorney's compensation exceeded the Criminal Justice Act standard by $20 per hour for court time and by $15 per hour for time out of court; or (2) the total hourly compensation of $100 per hour in court time and $70 per hour out of court time substantially exceeded the standards of the Criminal Justice Act. Either way, the award made by the District Judge distinguished the private law firms which brought this action from any publically-funded law firm.

A.

Claims Against A Municipality May Be Treated Differently Under Connecticut Law Than Claims Made Against A Private Employer.

The City of New Haven had pointed out to the trial judge, in its memorandum on attorney's fees, that Section 7-111 of the Connecticut General Statutes, "Proof of Claims Against Municipality", require that "no commission, discount, reward or present of any kind has been received or is promised or expected on account of [services rendered to any town or city]." Although the City conceded that the state statute, if it were in conflict with the federal statute, would not take priority over the federal statute, it noted that in this case there was no con-

flict, because the federal statute involved only allows the judge to make awards in his discretion if he deems them proper. The City had argued that one element which should commend itself to the judge's discretion was that an attorney fee award not run afoul of this state law. Under the provisions of this state law, it was argued, the plaintiffs would be entitled to no more than reasonable compensation for hours spent. Since this statute only applied to claims being made for services rendered to a municipality, the City made no reference to any possible fee schedule which might be assessed against a private defendant in a Title VII case. The force of the argument below was simply that any multiplier or bonus could have been challenged under state law, and it is reasonable to conclude that the trial judge's failure to grant any bonus or contingency in this case could have been because he exercised his discretion in accordance with the Connecticut statutes.

III.

The Court Did Not Abuse Its Discretion In Denying The Appellants An Award Of Fees Against The Appellees For Time Spent In Opposing Intervention.

The argument made by the appellants in their brief at 34-37, overlooks the fact that fee awards are discretionary and ordered under the equitable powers of the court. Moreover, the appellants have mischaracterized the trial court's decision as a "denial" of fees. In fact, had the appellants petitioned for fees against the Firefighter's Committee To Preserve Civil Service, Inc. (hereafter "FCPCS") there is no doubt that fees

would have been awarded in an appropriate amount against this nonprofit corporation. Since the City of New Haven, after a final settlement order, denied and opposed any attempts to intervene by outside parties, equity does not require that it pay attorneys' fees for other counsel who happened to join with it in opposing this intervention. There is no way that the City of New Haven can be turned from a "prevailing party" with regard to the application for intervention, into a party who did not prevail. Both the City and the Firebird Society attorneys sought to uphold a mutual goal which they had reached in the settlement ordered by the District Court.

In essence there were two lawsuits involved here, one which was completed by a settlement order of August 30, 1974, and in which the appellants were the "prevailing party," and in which the trial court has assessed fees against the City of New Haven. The second lawsuit, coming after the final judgment of the District Court, involved the FCPCS as a proposed intervener against the Firebird Society and City of New Haven as stakeholders in the settlement order. In that second lawsuit, the Firebird Society and City of New Haven prevailed. Significantly, the appellants cite no cases in support of their startling assumption that a fee award should be assessed against a party who prevailed with them in a separate action. This court should determine that the refusal of the trial judge, on equitable grounds, to award fees against the City of New Haven was not an abuse of discretion.

IV.

CONCLUSION

As this court said in *City of Detroit* v. *Grinnell Corp., supra,* at 469: "For the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding 'windfall fees' and that they should likewise avoid every appearance of having done so. . . . The award must be made with an eye to moderation and, if for no other reason but to allay suspicion, the court should typically take pains to allow a complete airing of all objection to a petitioner's fee claim." In this case, there were many objections before the trial court to the award of fees which was eventually ordered. Fees which cost the defendant $100 per hour for legal services and $70 per hour for clerical or administrative tasks cannot be said to be below the boundaries of a moderate award. Similarly, they cannot be said to be an abuse of the judge's discretion, and for that reason the appellees urge this court to affirm the decision of the trial judge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this day, February 24, 1977, a copy of the foregoing Brief and Appendix has been mailed postage prepaid to the following:

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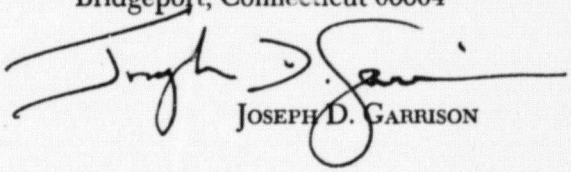

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